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92-85

No. _____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1992

MORRIS M. RAND,
Petitioner,

v.

JAMES A. PROSTKO, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 7, 1992.

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July 7, 1992.

QUESTION PRESENTED FOR REVIEW

Did the courts below grossly misapprehend the doctrine of judicial estoppel in precluding petitioner from arguing against personal liability of $1.2 million on a debt which he expressly and consistently avoided personally guaranteeing on numerous occasions in the course of judicial proceedings, including before the Bankruptcy Court that initially invoked the doctrine against him?

LIST OF PARTIES

The appellants in the United States Court of Appeals for the Third Circuit were Morris M. Rand and MRGB, Inc. MRGB, Inc. is not joining in this petition and has no interest in its outcome.

The appellee in the Court of Appeals was James A. Prostko, Chapter 11 Trustee for Pizazz Disco & Supper-club, Inc., the named respondent in this proceeding. Robert Wunker, Esquire and Blackwell, Walker, Fascell and Hoehl were defendants in the Bank-ruptcy Court adversary proceeding but were not parties in the District Court or Court of Appeals proceedings.

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JAMES A. PROSTKO, Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

Petitioner Morris M. Rand respectfully prays that a writ of certiorari be issued to review the Judgment Order dated February 3, 1992 of the United States Court of Appeals for the Third Circuit. That Judgment Order perpetuated the erroneous departure by the United States Bankruptcy and District

Courts for the Western District Court of Pennsylvania from the established law concerning the doctrine of judicial estoppel. This Court should grant the petition to settle the conflict in the law of judicial estoppel created by the decisions in this case and to resolve the lower federal courts' confusion concerning the scope and applicability of the doctrine generally.

OPINIONS BELOW

The Memorandum Opinion and Order dated May 16, 1990 issued by the United States Bankruptcy Court for the Western District of Pennsylvania, granting judgment in favor of plaintiff-respondent James A. Prostko, Chapter 11 Trustee for Pizazz Disco & Supperclub, Inc., and against defendant-petitioner Morris Rand and defendant MRGB, Inc. in

the amount of $1,155,339.70 (10a) is reported at 114 B.R. 104.

The Order dated June 19, 1991 issued by the United States District Court for the Western District of Pennsylvania affirming the Order of the Bankruptcy Court (3a) is unreported but appears at 1991 WL 331033. The District Court's Order dated July 2, 1991 denying Morris Rand's and MRGB, Inc.'s Motion for Rehearing (52a) is also unreported.

The Judgment Order entered by the Court of Appeals for the Third Circuit on February 3, 1992 affirming the Order of the District Court (1a) is unreported. The Court of Appeals' Order dated April 8, 1992 denying Morris Rand's petition for panel rehearing of

its Judgment Order (48a) is also unreported.

STATEMENT OF JURISDICTION

The Judgment Order of the Court of Appeals was entered on February 3, 1992. The Order denying panel rehearing was entered on April 8, 1992. Jurisdiction of this Court is grounded upon 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the inexcusable failure of three separate courts to follow clearly established precedent and their misapprehension of the doctrine of judicial estoppel. The courts below applied the doctrine to preclude petitioner from arguing against his personal liability under a negotiated and agreed upon Bankruptcy Court Order

of Sale that was not intended or expected to bind him personally -- and thereby held him liable for more than $1 million under that very Bankruptcy Court Order.

1. The Order of Sale Approved by Judge Fitzgerald

Pizazz Disco & Supperclub, Inc. (the "Debtor") filed a voluntary petition under Chapter 11 of the Bankruptcy Code on December 3, 1987. Before the bankruptcy petition was filed, a principal of the Debtor, Thomas Jayson, began efforts to sell its business and assets. By January of 1988, it was contemplated that petitioner Morris M. Rand would be designated "buyer" and fund the purchase and that George Blacke would renovate and manage the property.

On April 19, 1988, Mr. Rand entered into an agreement to purchase the Debtor's business and assets under which he could, subject to Bankruptcy Court approval, assign his rights and interests to a third party. Mr. Rand's liability under this agreement was limited to liquidated damages of $100,000.

On April 28, 1988, the Debtor submitted an Amended Motion for Approval of Sale of its Business and Assets for $1.25 million to MRGB, Inc., a joint venture between Mr. Rand and Mr. Blacke. Judge Fitzgerald of the Bankruptcy Court thereupon conducted three hearings, on May 19, May 24, and May 31, 1988, concerning the proposed sale to MRGB, Inc. At the conclusion of the May 31, 1988 hearing, the Court requested from all interested parties a

jointly drafted proposed Order setting forth the agreed upon terms of sale. The proposed Order that was negotiated by the parties and submitted to the Bankruptcy Court for approval named no purchaser other than MRGB, Inc. Nor did the proposed Order mention Mr. Rand or designate anyone as guarantor of the purchaser's obligations.

After hearing all of the parties and carefully reviewing the proposed Order of Sale, Judge Fitzgerald determined to approve the proposed Order with certain modifications. Among other things, Judge Fitzgerald sua sponte inserted an integration clause into the Order, thereby assuring that only those parties specifically named in the Order would have any rights or obligations thereunder, and confirming the expectations of all parties that

only MRGB, Inc. was obliged to purchase the Debtor's assets. In requiring an integration clause, Judge Fitzgerald stated:

> "Let's look first at the Order confirming the sale. The first paragraph I'd like to address unless someone wants to talk about any before this. It's paragraph seven.
>
> Paragraph 7, I think, needs to have added to it that this Order constitutes the entire terms of sale as approved by the Court and any other agreements that were signed or previously executed between the Debtor and any other parties including the purchaser here are null and void." (Tr. of May 31, 1988 Hearing at 27)

Judge Fitzgerald ultimately confirmed the sale of the Debtor's assets "to MRGB, Inc., a Florida corporation," for $1,250,000 and entered the Order of Sale as modified on May 31, 1988. (54a) No appeal was ever taken from this Order of the Bankruptcy Court confirming the sale to MRGB, Inc.

The events leading up to the entry of the Order of Sale make clear that the omission of Mr. Rand from the Order was not accidental or inadvertent. The Order was originally drafted by eight bankruptcy attorneys, including counsel for the Debtor. (Tr. of May 24, 1988 Hearing at 42-43) After extensive negotiation, the draft Order was not only agreed to by the parties but was reviewed at length by Judge Fitzgerald and ultimately approved after modification. (Tr. of May 31, 1988 Hearing at

37-98) There was ample opportunity for the parties or the Bankruptcy Court to seek to insert language in the Order to bind Mr. Rand individually to purchase or to guarantee the purchase of the Debtor's assets. Significantly, however, none of them made any effort to do so.

Further, the terms of the Order of Sale were completely consistent with the representations of Mr. Rand and his counsel, Robert Wunker, who maintained all along that Mr. Rand would not personally guarantee MRGB, Inc.'s obligations under any circumstances. This position was clearly and repeatedly articulated in open court:

-- For instance, at the May 19, 1988 hearing, Mr. Wunker, speaking on behalf of Mr. Rand,

stated in no uncertain terms, "Mr. Rand will not sign a guarantee . . . ." (Tr. of May 19, 1988 Hearing at 27)

-- Mr. Wunker reiterated at the May 24, 1988 hearing: ". . . . Mr. Rand will not provide any personal guarantee . . . " (Tr. of May 24, 1988 Hearing at 39)

-- And again at the May 31, 1988 hearing, the attorney for the landlord for the premises, Mr. Cohen, acknowledged, "Mr. Rand has made it clear that he . . . won't put up any of his own money to guarantee these rental payments . . . . " (Tr. of May 31, 1988 Hearing at 73)

The Bankruptcy Court itself also accepted as a given in the hearings on the proposed Order of Sale that Mr. Rand was not himself purchasing the Debtor's assets or guaranteeing MRGB, Inc.'s obligations under the Order. Thus, Judge Fitzgerald noted, "Well, the problem is that [Mr. Rand] is not to be the purchaser or to guarantee the actual terms of the lease." (Tr. of May 19, 1988 Hearing at 27) And Judge Fitzgerald later observed, "I did hear [Mr. Wunker] say Mr. Rand wouldn't provide [a personal guarantee]." (Tr. of May 19, 1988 Hearing at 35-36)

2. Judge Markovitz's Decision To Enforce the Order Naming Only MRGB, Inc. Against Morris Rand

On December 13, 1988, James A. Prostko, Trustee for the Debtor, commenced an adversary proceeding in the

Bankruptcy Court against MRGB, Inc., Mr. Rand, Mr. Wunker, and the law firm of Blackwell, Walker, Fascell and Hoehl, which represented MRGB, Inc. and Mr. Rand along with Mr. Wunker, to enforce the Order of Sale that Judge Fitzgerald had issued approving the sale of the Debtor's assets to MRGB, Inc.

Judge Fitzgerald recused herself from the adversary proceeding, which was then reassigned to the Honorable Bernard Markovitz of the Bankruptcy Court. On February 23, 1988, Judge Markovitz approved a stipulation dismissing Mr. Wunker and his law firm. However, Judge Markovitz declined to dismiss Mr. Rand.

At trial on April 5, 1990, representatives of the Debtor, including Mr.

Jayson, testified that they believed Mr. Rand was the purchaser of the Debtor's assets. (Tr. of April 5, 1990 Hearing at 53-57) After the trial was concluded, Judge Markovitz issued a Memorandum Opinion and Order dated May 16, 1990 finding against both MRGB, Inc. and Mr. Rand in the amount of $1,155,339.70 and directing Mr. Wunker and his firm to distribute to the Debtor the sum of $100,000.00 plus interest which they had been holding in escrow. (10a)

Judge Markovitz acknowledged in his Memorandum Opinion and Order that the May 31, 1988 Order of Sale "confirmed the sale to MRGB, not to Morris Rand." (40a) Judge Markovitz nonetheless concluded, "Even so, Rand is liable for any violation of the order to the same extent as is MRGB." (40a)

Judge Markovitz based this startling conclusion on the doctrine of judicial estoppel, holding that Mr. Rand was precluded from arguing that he was not personally liable for the purchase money because this argument was "inconsistent with his earlier position." (46a) In support of this holding, Judge Markovitz relied on the fact that in the course of the proceedings Mr. Wunker "represented . . . that MRGB would not be a shell corporation, that Rand would provide the $1 million in cash for MRGB's purchase, and that Rand was willing to go forward with the purchase on that basis." (44a)

Notwithstanding the language of the Order of Sale itself, including the integration clause inserted by Judge Fitzgerald, Judge Markovitz stated that "[t]he implication of these represen-

tations, as understood by the Court, was that Rand, while not purchasing Debtor's business and assets in his own name, was in reality purchasing them on behalf of MRGB." (44a) (emphasis in original) Judge Markovitz also stated, "More importantly, the Court ultimately relied on these representations by Defendant Morris Rand's attorney in confirming the sale to MRGB instead of insisting that Rand fulfill his obligation pursuant to the April 19, 1988 agreement." (45a) Despite the fact that under this April 19, 1988 agreement Mr. Rand could renege and pay only $100,000, Judge Markovitz held him liable for the purchase price under the Order of Sale on the ground that "the sale to MRGB would not have been confirmed" and Mr. Rand "personally would have been required to comply with his

[earlier] commitment" if he had not represented that he would finance the purchase by MRGB, Inc. (45a)

3. Appellate Proceedings

By Order dated June 19, 1991, the Honorable Donald E. Ziegler of the United States District Court for the Western District of Pennsylvania affirmed Judge Markovitz's Order. (3a) The District Court's reasoning tracked Judge Markovitz's rationale for his decision exactly. The District Court subsequently denied a Motion for Rehearing filed by Mr. Rand and MRGB, Inc. by Order dated July 2, 1991. (52a)

The United States Court of Appeals for the Third Circuit without any explanation whatsoever affirmed the June 19, 1991 Order of the District

Court by Judgment Order dated February 3, 1992. (1a) The Court of Appeals denied Mr. Rand's petition for panel rehearing on April 8, 1992. (48a)

Jurisdiction of the District Court was founded upon 28 U.S.C. § 158, since the appeal was from a final order of the United States Bankruptcy Court for the Western District of Pennsylvania entered in an adversary proceeding under 28 U.S.C. § 157.

REASONS FOR GRANTING THE WRIT

This Court should grant review of the decision below to correct a glaring and unjustifiable departure in this case from the well-established elements required in all federal courts that invoke the doctrine of judicial estoppel. Review also is justified in order

to clarify the scope of the doctrine, as to which the lower federal courts and commentators alike have expressed considerable confusion and disagreement.

While it recently alluded to it in passing,[1] this Court apparently has not ruled on the applicability or validity of the doctrine of judicial estoppel since its pronouncement in Davis v. Wakelee, 156 U.S. 680, 689 (1895), where the Court stated:

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1. In Huffman v. Pursue, 420 U.S. 592, 606 n.18 (1989), the Court stated:

> We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues, or that the normal rule of res judicata and judicial estoppel do not operate to bar relitigation in action under 42 U.S.C. § 1983 of federal issues arising in state court proceedings.

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The time has come for the Court to set the limits of this ancient doctrine once and for all so that it cannot be wielded as a sword against an unsuspecting litigant like Mr. Rand who, relying upon a valid contract, sought to participate in a substantial business transaction without risking personal liability only to find himself unfairly precluded from defending him-

self against an unwarranted million-dollar judgment.

As this Court has recognized, because estoppels generally "blockade[ ] unexplored paths that may lead to truth," they should be "invoked only after careful inquiry." Brown v. Felsen, 442 U.S. 127, 132 (1979) (discussing res judicata). The Court should delineate the nature of that "careful inquiry" in judicial estoppel cases both for the guidance of the lower courts and to avoid injustices purportedly imposed to preserve the integrity of the judicial system such as occurred here.

1. This Court's Guidance Is Needed To Clarify the Scope of the Doctrine of Judicial Estoppel Generally.

Although each court applies a slightly different test, judicial estoppel has a set of core elements that most jurisdictions accept: the doctrine is used to disallow a party's factual representations (1) that clearly contradict (2) an earlier, unequivocally asserted version of the facts (3) that previously benefitted the party. Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982); Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1982). The doctrine appears to have first been articulated in Hamilton v. Zimmerman, 37 Tenn. (5 Sneed) 39, 47-48 (1857), as an "absolute rule" which commentators have said was designed "to protect the sanctity of the oath, and to safeguard

the judicial system from being abused and having its image tainted." Douglas W. Henkin, Note, Judicial Estoppel -- Beating Shields into Swords and Back Again, 139 U. Pa. L. Rev. 1711, 1713 (1991).

In Hamilton, supra, the court held that an assertion in one judicial proceeding could operate to estop an attempt to contradict that assertion in a later proceeding unless the initial assertion was due to mistake, inadvertence, or fraud. 37 Tenn. (5 Sneed) at 47-48. The Court of Appeals for the Third Circuit has followed Hamilton and espoused perhaps the most widely accepted rationale for the doctrine: to preserve judicial integrity by preventing litigants from "playing fast and loose" with judicial proceedings. Scarano v. Central R. Co., 203 F.2d

510, 513 (3d Cir. 1953). What exactly is meant by "playing fast and loose" with a given court is not, however, clear.

The lower federal courts that have utilized the doctrine of judicial estoppel have done so in a patchwork and haphazard manner. At present "each court tends to apply a different construction of the rule." See Mark J. Plumer, Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo. Wash. L. Rev. 409 (1987). For instance, some require a willful inconsistency for the doctrine to apply. See, e.g., Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987). Indeed, one commentator has suggested that the whole doctrine of judicial estoppel has been undermined by the varying standards

among the states and federal circuits. Rand G. Boyers, Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw. U. L. Rev. 1244 (1986).

The policies behind judicial estoppel demand consistent application of the doctrine. To allow the present disharmony to continue would compromise the very integrity of the court system that judicial estoppel was designed to protect and frustrate use of the doctrine as an equitable remedy.

Judicial estoppel aims to protect the court, not the litigants. It should be applied only in clear cut cases, where there has been what amounts to an effort to deceive the court, not in cases like this one. There is no evidence that Mr. Rand did

anything to mislead the Bankruptcy Court in this case. Accordingly, the courts below should not have applied the doctrine against him. This Court should intervene to forestall further instances of misuse of judicial estoppel and to clarify the contours of the doctrine's application.

2. Reversal of the Decisions Below Would Elucidate the Nature of the Careful Inquiry Required To Invoke Judicial Estoppel.

In order for Mr. Rand to have been judicially estopped in this case from denying personal liability under the Order of Sale, he would have had to have successfully and unequivocally asserted that he was personally liable under the Order of Sale, and the Court would have had to have accepted that position. See Edwards, supra, 690 F.2d

at 598. That clearly is not what happened here.

To the contrary, Mr. Rand consistently refused to personally guarantee MRGB, Inc.'s obligations. His lawyer did not assert and offer proof to the Bankruptcy Court to support a position that he is now contradicting. In fact, his position has not changed. But "[f]or the invocation of the doctrine, the two positions must be diametrically opposed." Boyer, supra, 80 Nw. U. L. Rev. at 1264.

Moreover, Judge Markovitz clearly broke from established precedent in not requiring an unequivocal assertion by Mr. Rand before invoking the doctrine of judicial estoppel against him. Edwards, supra, 690 F.2d 595. Even if Mr. Rand's consent through his lawyer

on one occasion to finance the purchase by MRGB, Inc., standing alone, could somehow have justified holding him personally liable for the purchase money, it was error for Judge Markovitz summarily to disregard the numerous occasions where Mr. Rand made it clear that he was not personally guaranteeing the purchase. At worst, Mr. Rand's position in 1988 was equivocal; it certainly was not sufficiently unambiguous as to warrant the harsh result reached here.

Finally, it cannot be said that Mr. Rand personally benefitted and the court was harmed by his asserting before the Bankruptcy Court -- assuming arguendo that he did so assert -- that he would be liable for the purchase of the Debtor's assets. The Order of Sale did not even mention Mr. Rand, let

alone require him to purchase the Debtor's assets. This Order was jointly negotiated by the parties, in large part in open court, and was carefully reviewed and modified before it was approved by the Bankruptcy Court. The intentional omission of Mr. Rand from the Order of Sale and the inclusion of the integration clause establishes beyond doubt that neither the parties nor Judge Fitzgerald intended to hold Mr. Rand liable under the Order of Sale. There could be no harm to the court in this case in permitting the judicially approved Order of Sale to

stand, and entering judgment only against MRGB, Inc.

Nor should Judge Markovitz have been influenced by the 1990 trial testimony by representatives of the Debtor describing their understanding of Mr. Rand's position in this dispute. These witnesses' after-the-fact, self-serving testimony presented to Judge Markovitz in 1990 establishes nothing with respect to how Mr. Rand's representations, and those of his counsel, were viewed by Judge Fitzgerald in 1988.

It is sadly ironic that an estoppel theory was used against Mr. Rand when in fact it was the Trustee who should have been precluded from changing his own specifically articulated position to obtain an advantage for the Debtor. The Trustee participated in

the negotiations and hearings in open court that led to the approval of the Order of Sale by Judge Fitzgerald; he did not object to the naming of MRGB, Inc. only as purchaser, and in fact agreed thereto. The Trustee should not now be permitted to argue that Mr. Rand, not MRGB, Inc., was intended or expected to be liable under the Order of Sale for $1.2 million. Indeed, the Trustee had earlier agreed that if Mr. Rand were the purchaser, his liability would be limited to $100,000 in liquidated damages.

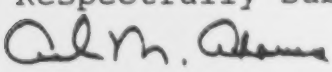
It would be grossly unfair for the Trustee to recover a million-dollar windfall from Mr. Rand because of the Bankruptcy Court's decision to strike down a fairly negotiated, carefully drafted, court-approved agreement and to hold an individual who is not even

named in the agreement personally liable for breaching it. This Court should take the opportunity presented by this case to clarify the rampant confusion in the lower courts regarding judicial estoppel by reversing the travesty of justice that occurred in this case in the name of that doctrine.

CONCLUSION

The Court should grant the petition and reverse the judgment of the court below in order to provide much needed guidance to federal courts concerning the doctrine of judicial estoppel and to resolve the existing conflicts among those courts as to its various elements.

Respectfully submitted,



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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3477

JAMES A. PROSTKO, TRUSTEE

v.

MORRIS M. RAND; MRGB, INC.; ROBERT WUNKER, ESQUIRE; and BLACKWELL, WALKER FASCELL AND HOEHL

Morris M. Rand and MRGB, Inc.,

Appellants

On Appeal from the United States District Court For the Western District of Pennsylvania
(D.C. Civil Action No. 90-01163)
District Judge:
Honorable Donald E. Ziegler

Submitted Under Third Circuit Rule 12(6)
January 22, 1992

BEFORE: STAPLETON, SCIRICA, and ALITO, Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ORDERED AND ADJUDGED that the order of the district court dated June 19, 1991, be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

Walter K. Stapleton /s/
Circuit Judge

ATTEST:

Sally Mvros /s/
Sally Mvros, Clerk

DATED: February 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

IN RE: PIZAZZ DISCO & SUPPERCLUB, INC.,	)	
Debtor.	)	Civil Action No. 90-1163
MORRIS M. RAND; MRGB, INC.; ROBERT WUNKER, ESQUIRE; and BLACKWELL, WALKER, FASCELL AND HOEHL,	)	Bankruptcy No. 87-3345
Appellants,	)	
v.	)	
JAMES A. PROSTKO, TRUSTEE,	)	
Appellee.	)	

ORDER OF COURT

AND NOW, this 19th day of June, 1991, after consideration of the appeal of Morris M. Rand and MRGB, Inc., from the opinion and order of the United States Bankruptcy Court for the

Western District of Pennsylvania, Markovitz, J., dated May 16, 1990,

The court finds as follows:

1. Findings of fact by the bankruptcy court shall not be set aside unless the district court determines that such findings are clearly erroneous. The bankruptcy court's conclusions of law are subject to plenary review. Bankruptcy Rule 8013; Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81, 84 (3d Cir. 1988).

2. As noted by the Bankruptcy Court, the court is the actual vendor in a bankruptcy sale and once an order confirming a sale is entered, it is binding and the parties may not deviate from the provisions of the order. See In Re Rosecrest Enterprises, Inc., 80 B.R. 354, 356 (Bankr. W.D. Pa.

1987). Judge Markovitz properly found that the order entered by Judge Fitzgerald on May 31, 1988 confirmed the sale of debtor's business and assets to MRGB and that no appeal was taken; therefore, MRGB's refusal to purchase debtor's business and assets violated that order. We further agree with the Bankruptcy Court that there was no basis to rescind the agreement to purchase debtor's business and assets.

3. As correctly noted by the Bankruptcy Court, under Pennsylvania law, fraud is an affirmative defense which must be proved by the party asserting it by clear and convincing evidence. Chrysler Credit Corp. v. First National Bank and Trust Co., 746 F.2d 200, 208 (3d Cir. 1984) (citations

omitted). The elements of fraud include: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient as the proximate result. Delahanty v. First Pennsylvania Bank, 318 Pa. Super. 90, 464 A.2d 1243, 1254 (1983). Here, the Bankruptcy Court's finding that no credible evidence of fraud was offered is not clearly erroneous.

4. The factual findings underlying the Bankruptcy Court's determination that appellants failed to establish by clear and convincing evidence their first allegation of fraud, i.e., that debtor was cognizant that

some of the equipment listed on the inventory sheet was missing or had never been purchased, are not clearly erroneous.

5. The factual findings underlying the Bankruptcy Court's determination that appellants failed to establish by clear and convincing evidence their second allegation of fraud, i.e., that debtor failed to disclose that certain light and sound equipment was fully encumbered by security interests which debtor had not revealed, are not clearly erroneous.

6. We affirm the Bankruptcy Court's finding that the doctrine of judicial estoppel is applicable to Rand and bars him from maintaining that he is not liable for MRGB's violation of

Judge Fitzgerald's order of May 31, 1988 by refusing to consummate the sale, because MRGB, not Rand, was the purchaser. That position is inconsistent with Rand's earlier representations that MRGB was not a shell corporation and that Rand was purchasing debtor's business and assets on behalf of MRGB, on which the Judge Fitzgerald relied in entering the order confirming the sale to MRGB. As stated by the Bankruptcy Court, the doctrine of judicial estoppel bars a party from asserting a legal position which is inconsistent with a previously asserted position. Scarano v. Central R. Co., 203 F.2d 510, 512-13 (3d Cir. 1953). See also Delgrosso v. Spang and Co., 903 F.2d 234, 241 (3d Cir.), cert. denied, 111 S. Ct. 428 (1990); Murray

v. Silberstein, 882 F.2d 61, 66 (3d Cir. 1989). The position urged by that party need only have been accorded judicial acceptance as a preliminary matter or as part of a final disposition. Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 588, n.15 (W.D. Pa. 1987) (citation omitted).

Accordingly, IT IS ORDERED that the order of the Bankruptcy Court dated May 16, 1990, be and hereby is affirmed.

Donald E. Ziegler
United States District Judge

cc: Counsel of record

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

IN RE:		
PIZAZZ DISCO & SUPPERCLUB, INC.,	:	Bankruptcy No. 87-3345
Debtor	:	
**********	:	
JAMES A. PROSTKO, TRUSTEE,	:	
Plaintiff	:	
v.	:	Adversary No. 88-0545
MORRIS M. RAND; MRGB, INC.; ROBERT WUNKER, ESQUIRE; and BLACKWELL, WALKER, FASCELL AND HOEHL,	:	
Defendants	:	

MEMORANDUM OPINION

Before the Court is a Complaint by Plaintiff James A. Prostko, Esq. ("Trustee") for damages as a result of a violation by Defendants Morris M. Rand and MRGB, Inc. of

an Order of Court confirming the sale of Debtor's business and assets to MRGB.[1]

The Trustee avers that Debtor was ready and willing to consummate the sale and that Rand and MRGB have, without justification, refused to do so, in violation of the valid and Final Order of Court.

Defendants Rand and MRGB contend that Debtor fraudulently

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1. On February 23, 1989, the Court entered an Order approving a stipulation to dismiss with prejudice Count II of the Complaint, in which the Trustee sought to recover $100,000.00 which Defendants Robert Wunker, Esq., and the law firm of Blackwell, Walker, Fascell and Hoehl held in escrow pending the closing of the sale of Debtor's business and assets to Morris Rand and/or MRGB, Inc. The Order further provided that said Defendants were to hold the money in a market investment account pending further Order of this Court.

misrepresented what assets were to be sold and that, as a consequence, they were entitled to rescind the agreement to purchase Debtor's business and assets. Defendant Rand further denies that he violated the Order of Court for the reason that said Order named only MRGB and not Rand as "buyer."

The issues before the Court appear to be three-fold, to wit:

(1) Is There a Valid Sale? This Court answers that question in the affirmative, as The Honorable Judith K. Fitzgerald executed a Court Order on May 31, 1988 confirming the sale in question. Said Order was transmitted to Defendants and no appeal was

taken from same; therefore, that issue is resolved.

(2) Is There a Basis To Vacate The Sale?

This Court answers that question in the negative. Defendant Rand knew what he was purchasing, as his agent, George Blacke, was placed upon the premises well prior to the sale. Said agent thoroughly inventoried the items to be sold and was confident that said items or comparable items were incorporated into the agreement of sale executed by Buyer, Defendant Morris Rand, and Seller, Debtor-in-Possession.

No credible evidence of fraud was offered. Defendants' eleventh hour offer of a UCC-1 search was rejected as a surprise on the Plaintiff and because Defendants [sic] obvious lack of information made its probative value de minimus.

(3) Against Whom Is the Court Order Enforceable?

This Court determines from the evidence offered at trial, including the statements of Defendant Morris Rand's counsel, which were offered in open court and the testimony and exhibits offered at trial, that the Order is enforceable against

both Defendants Morris Rand and MRGB, Inc.

In accordance with the reasoning set forth below, judgment will be entered for the Trustee and against Defendants Rand and MRGB in the amount of $1,155,339.70.

JURISDICTION

Jurisdiction over this action is conferred upon this Court by 28 U.S.C. § 1334 and 28 U.S.C. § 157, as this action is a core proceeding.

Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

FACTS

Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on December 3, 1987.

At the time of the filing, Debtor owned and operated a disco and supperclub under the names "Pizazz" and "Vegas," respectively, in Fort Lauderdale, Florida. They were housed in the same building and shared a common kitchen. Pizazz opened for business in August of 1986. Vegas opened for business in March of 1987.

Debtor leased space for its operations from J.J. Gumberg Company. The sound and lighting equipment for the two clubs were leased from Banc One Leasing under two separate leases. The lessee of the equipment in both

instances was Jayson and Associates, another corporate entity owned by Thomas Jayson, a principal of the debtor in this case. Jayson and Associates in turn assigned its rights and lessee to Debtor once Debtor had been incorporated.

Debtor's facility underwent considerable remodeling subsequent to the filing of the bankruptcy petition. Pizazz was converted to an under-21 club. Vegas was converted to a disco and renamed "Chauncy's." These conversions necessitated substantial changes in the furniture and equipment at the clubs.

In September of 1987, approximately three (3) months before Debtor filed its petition, Thomas Jayson began

efforts to sell Debtor's business and all of its assets.

In January of 1988, Jayson was contacted by a real estate broker who represented that he had a client who might be interested in purchasing Debtor's business and assets. Shortly thereafter, Jayson met with the broker and various members of the Blacke family and subsequently showed them the clubs on several different occasions. Although it was contemplated that Morris Rand would be designated "buyer" and provide the funding for this purchase he was not present at these preliminary meetings with the Blackes.

In late-March or early-April of 1988, Jayson met personally with Morris Rand and Robert Wunker, Rand's

attorney, to discuss the purchase of Debtor's business and assets by Rand. On April 5, 1988, Rand wrote a letter to Jayson in which he expressed his intention to purchase Debtor's business and assets in accordance with terms and conditions to be set forth in an agreement of sale to be executed at a later time. On April 7, 1988, Defendant Rand's lawyer caused a letter to be transmitted to counsel to both Debtor and Thomas Jayson. The letter was to introduce Rand and the Blackes to the lessor J.J. Gumberg Company by providing information as to their business backgrounds. The letter stated, among other things, that Rand would "be providing the capital for the venture"; that Rand had an unleveraged net worth in excess of $10 million dollars; that

the Blackes had substantial experience in the night club business; and that they (the Blackes) would manage and operate the business. The obvious purpose of the letter was to allow the landlord to know he was dealing with responsible individuals and to pave the way toward an assumption of the lease.

On April 19, 1988, Defendant Morris Rand, designated purchaser, and Jayson, in his capacity as President of Debtor, designated seller, executed an agreement of sale. The agreement provided that Rand would purchase Debtor's business and all of its assets, as listed on an inventory sheet dated November of 1987. The agreement further provided, inter alia, that Rand could, subject to approval by the Court,

assign his rights and interests to a third party.

The Blackes were involved in verifying the accuracy of the inventory sheet attached to the agreement of sale. They, along with Jayson, inventoried all of the equipment and furnishings in the clubs on at least two (2) separate occasions prior to execution of the agreement of sale, and appeared confident that the equipment to be sold, or comparable equipment, was in fact located upon the premises.

On April 28, 1988, Debtor submitted an amended motion for approval of sale of its business and assets to a joint venture known as MRGB, Inc., Morris Rand's assignee. ("MRGB" was an acronym derived from the initials of

Morris Rand (MR) and George Blacke (GB).) MRGB determined to be in possession of Debtor's business and assets prior to confirmation of the sale by the Court. As a consequence, Debtor entered into a management agreement with MRGB, wherein MRGB was to become the exclusive manager of the clubs and was to pay the rent for May of 1988 directly to the landlord.

On April 26, 1988, the landlord submitted a motion for relief from stay. On May 1, 1988, the Blackes assumed operational control of Debtor's business. On May 4, 1988, Debtor submitted a motion for authority to enter into a management agreement with MRGB to operate Debtor's business pending confirmation of the sale by the Court.

Several hearings on these various motions were held by the Court. The first hearing was held on May 19, 1988, wherein Robert Wunker, Esquire entered his appearance and was an active participant on behalf of Defendant Morris Rand. Additional hearings on the above motions were held on May 24, 1988 and May 31, 1988, respectively, wherein counsel represented and testified on behalf of Defendant Morris Rand.

At the conclusion of the hearing held on May 31, 1988, the Court requested that all interested parties collaborate in drafting a proposed Order of Court setting forth agreed-upon terms of sale. A proposed Order was submitted to the Court later that day. After review and minor

modification, the Court confirmed the sale in question to MRGB, Inc. for the consideration of $1,250,000.00. The sale included Debtor's business and all of its assets, including Debtor's interest in leasehold property, furnishings, name, furniture, fixtures, equipment, goods, and existing liquor license, as set forth in the same inventory sheet that was attached to the agreement of sale executed by Defendant Morris Rand on April 19, 1988. Of the total sale proceeds, $1 million was to be paid in cash at the time of closing, with the remaining $250,000.00 to be credited to purchaser upon its assumption of the Banc One leases. The Order specifically provided that MRGB would not be granted credit for the rental payment it had made for the month of

May of 1988; however, an administrative claim could be submitted to assure reimbursement of this expense.

The Order was duly docketed and served upon all parties in interest, including Defendants herein. No appeal was ever taken from the Order of Court issued on May 31, 1988 confirming the sale.

On June 1, 1988, counsel to Defendant Morris Rand advised Debtor and others, by letter, that MRGB was unwilling to close on the sale. The sole reason given at that time was that the Order of Court confirming the sale did not grant MRGB a credit against the purchase price for the rental payment it had advanced for May of 1988. Defendant offered no complaint relating

to the assets purchased or the quality of title to the equipment present on the premises as of that date.

After the period for appealing the Order of May 31, 1988 had expired, Defendant Rand's counsel notified Debtor's counsel that there was a problem with the light and sound equipment at the clubs. The Blackes, who had been in control of the clubs since May 1, 1988, claimed that certain items which had been listed on the Banc One leases were not on the premises. This was the first indication of a purported problem of this nature. In an effort to close the deal, Debtor-in-Possession offered items of personalty in addition to those contained in the agreement of sale. This offer of Debtor-in-Possession to give more to Defendant

than it had bargained for was rejected. As the April 19, 1988 agreement required Debtor to desist from any further efforts to secure a purchaser and, as no other buyers were available when this transaction failed, Debtor was caused to ceased operations and close its doors.

On June 21, 1988, James Prostko was appointed Chapter 11 Trustee. On June 28, 1988, the case was converted to Chapter 7 and Prostko was retained as Chapter 7 Trustee.

On September 1, 1988, October 6, 1988, and June 1, 1989, sales were held wherein Debtor's assets were sold in an effort to secure funds to the benefit of the Debtor's creditors and, in an effort to mitigate damage.

A total of $94,660.30 was secured as a result of these sales.

ANALYSIS

The Court is the actual vendor in a bankruptcy sale. The purchaser acquires rights in the property sold only upon confirmation by the Court. In re Rosecrest Enterprises, Inc., 80 B.R. 354, 356 (Bankr. W.D. Pa. 1987).

Once an Order confirming a sale is entered, it is binding on the parties. Their rights and obligations are fixed thereby, and they are not permitted to deviate therefrom. The purchaser is bound by the Order. Id.

In light of the foregoing, it is clear that MRGB had an obligation to

purchase Debtor's business and assets and that its refusal to do so was in violation of the Order of May 31, 1988.

MRGB counters that it is not in violation of the Order because Debtor committed fraud. According to MRGB, Debtor was cognizant that it was not in a position to sell what it purported to be selling. It alleges that Debtor fraudulently represented that it was selling all of its assets when it knew that some of the light and sound equipment listed on the inventory sheet was missing or had never been purchased. In addition, MRGB alleges that some of the equipment in the clubs was already encumbered by security interests which Debtor had not revealed.

Both of these contentions by MRGB are without merit.

A) **Fraudulent Misrepresentation**

Federal Rule of Civil Procedure 8 applies in adversary proceedings in this Court. Bankruptcy Rule 7008(a).

Fraud is an affirmative defense. See Fed.R.CIV.P.8(c). One who pleads an affirmative defense in effect admits the truth of the allegations in the Complaint, but nevertheless asserts facts which, if proven, exculpate the defendant and defeat recovery. Fleming v. Kane County, 636 F.Supp. 742, 749 (N.D. Ill. 1986); U.S. Home Corp. v. George W. Kennedy Construction Co., 610 F.Supp. 759, 761 (N.D. Ill. 1985).

The burden of proving an affirmative defense is upon the party asserting it. Martin v. Weaver, 666 F.2d 1013, 1019 (6th Cir. 1981), cert. den'd, 102 S.Ct. 2038, 456 U.S. 962, 72 L.Ed.2d 485 (1982); Jones v. Taber, 648 F.2d 1201, 1203 (9th Cir. 1981).

Under Pennsylvania law, fraud must be proved by clear and convincing evidence. Chrysler Credit Corp. v. First National Bank and Trust Co. of Washington, 746 F.2d 200, 208 (3rd Cir. 1984).

The elements of fraud are as follows. There must be:

(1) a misrepresentation;

(2) a fraudulent utterance thereof;

(3) an intention by the maker that the recipient will thereby be induced to act;

(4) justifiable reliance by the recipient upon the misrepresentation; and

(5) damage to the recipient as the proximate result.

Delahanty v. First Pennsylvania Bank, 464 A.2d 1243, 1252 (Pa. Super. 1983).

Careful review of the evidence presented persuades this Court that MRGB has failed to establish, by clear and convincing evidence, the affirmative defense of fraud with respect to either of the allegations of fraud which it has raised.

With respect to the first allegation of fraud -- i.e., that Debtor was cognizant that some of the equipment listed on the inventory sheet was missing or had never been purchased -- MRGB has, at the very least, failed to establish that:

(1) Debtor misrepresented which light and sound equipment it was selling;

(2) MRGB reasonably relied upon the inventory sheet attached to the agreement of sale and Order of May 31, 1988; and

(3) MRGB was damaged as the proximate result.

There was no misrepresentation by Debtor concerning the light and sound equipment which MRGB was purchasing. MRGB understood that it was purchasing all of the light and sound equipment in the clubs at the time of the agreement of sale and was equally aware of what equipment was there at that time. Defendants' agents had visited the clubs several times and had personally inventoried the light and sound equipment on at least two (2) occasions prior to the time when Rand executed the agreement of sale. Clearly, Defendant knew what it was purchasing.

Any reliance by MRGB, if indeed there was any reliance, upon the inventory sheet was unjustified for much the same reason. MRGB understood

that it was purchasing the light and sound equipment in the clubs as of April 19, 1988, and knew the specifics relating thereto. There was no detrimental reliance.

Finally, MRGB also has failed to demonstrate that it was damaged in any way by any purported fraudulent misrepresentations by Debtor concerning the light and sound equipment. It is not disputed that the items listed on the inventory sheet do not correspond completely with those items in the clubs as of April 19, 1988. All parties knew that the inventory sheet had not been compiled in connection with the sale of Debtor's business and assets to Morris Rand. Rather, it had been compiled prior to the opening of Pizazz and Vegas at the request of Banc

One in connection with the leases Banc One previously had granted to Jayson and Associates. It was understood that many items on the inventory sheet were not in the clubs as of April 19, 1988 for various reasons. Certain items on the sheet were never purchased due to their unavailability or due to design changes in the clubs. Substitutions were made for these items. Still other items had been removed and replaced with different equipment when Pizazz and Vegas underwent remodeling.

Although certain light and sound equipment listed on the inventory sheet (or their equivalents) were not in the clubs as of April 19, 1988, there was <u>additional</u> equipment in the clubs which was not listed on the inventory sheet. The value of the latter

($157,000.00) exceeded the value of the former ($92,952.00) by $64,128.00. Had MRGB gone forward with the sale, it stood to acquire equipment which was worth more than what was listed on the inventory sheet. All of this was clearly known to Defendants as a result of their quasi-management position, as well as their detailed inventory. To complain at this late date suggests a manufactured defense to avoid compliance with a legal duty. The arguments lack credibility.

MRGB also has failed to establish the second allegation of fraud -- i.e., that Debtor failed to disclose that certain light and sound equipment, which replaced other equipment, was fully encumbered by security interests.

Debtor was one of many businesses owned or controlled by Thomas Jayson. At various unspecified times, Jayson removed light and sound equipment from the clubs and replaced it with equipment belonging to other companies which he controlled.

MRGB failed to establish the preliminary matter that any of the replacement equipment in the clubs at the time of the agreement of sale was encumbered by security interests. It attempted to establish this by eliciting testimony concerning a UCC-1 search conducted in one (1) county in Pennsylvania under the names of several companies controlled by Jayson and then comparing the equipment so listed with the equipment in the clubs.

MRGB's proof on this preliminary matter would have been and/or was fatally deficient in two respects.

To begin with, Jayson controlled numerous companies in many and various locations. MRGB could not demonstrate that it had conducted UCC-1 searches under the names of every company controlled by Jayson, as they lacked the information basic to that search. Any last minute surprise testimony would carry unfair prejudice well beyond its probative value. Even if admitted and considered as true, the light it would cast would be of little value.

In addition, by this 11th hour testimony, Defendants could not establish that any equipment owned by

other companies controlled by Jayson, and which may have been subject to a security interest, was included among the items in the clubs. The generic descriptions attached to the inventory made this connection impossible. Nothing resembling fraud has been proven by clear and convincing evidence to this trier of fact.

B) Judicial Estoppel

The Order of May 31, 1988 confirmed the sale to MRGB, not to Morris Rand. Even so, Rand is liable for any violation of the Order to the same extent as is MRGB. Rand is judicially estopped from arguing, as he does, that he is not liable for any violation of the Order because it authorized the sale to MRGB, not to him.

Legal sleight of hand will not make this specious defense available to him.

In essence, the doctrine of judicial estoppel provides that a party who has asserted a position may not later on be heard in the same court to contradict himself in order to establish a totally inconsistent position. National Union Electric Corp. v. Matsushita Electric Industrial, 498 F. Supp. 991, 1012 (E.D. Pa. 1980). That party may be precluded (or estopped) from asserting the inconsistent position in the second proceeding. Erie Telecommunications, Inc. v. City of Erie, 659 F. Supp. 580, 588 (W.D. Pa. 1987); Wade v. Woodings-Verona Tool Works, Inc., 469 F. Supp. 465, 476 (W.D. Pa. 1979).

Judicial estoppel is a doctrine which prevents a party from playing "fast and loose" with the court. Lawrence v. United States of America I.C.C., 629 F. Supp. 819, 822 (E.D. Pa. 1985). The object of the doctrine is to protect the judiciary, as an institution, from perversion of the judicial machinery. Edward v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).

The doctrine applies if a party has successfully asserted an inconsistent position in a prior proceeding. City of Kingsport v. Steel & Roof Structures, Inc., 500 F.2d 617, 620 (6th Cir. 1974). This means that the party must have been successful in persuading the court to accept its position in the prior proceeding. Edward, supra at 599. "Acceptance" in

this context requires only that the court adopted the position urged by the party in the prior proceeding, either as a preliminary matter or as part of a final disposition. Edward, supra at 599, n.5.

The doctrine of judicial estoppel is applicable to Morris Rand in the present adversary proceeding.

A hearing was held on Debtor's motion to approve the sale of its business and assets on May 19, 1988. At that hearing, several creditors objected to the proposed sale because MRGB, and not Rand, was to be the purchaser. The Court also expressed concern that Rand was not to be the purchaser and would not guarantee

Debtor's lease with J. J. Gumberg Company.

Robert Wunker, who appeared at the hearing as Rand's attorney, confirmed that Rand would not guarantee the lease. He further represented, however, that MRGB would not be a shell corporation, that Rand would provide the $1 million in cash for MRGB's purchase, and that Rand was willing to go forward with the purchase on that basis.

The implication of these representations, as understood by the Court, was that Rand, while not purchasing Debtor's business and assets in his own name, was in reality purchasing them on behalf of MRGB. As the result of Rand's attorney's representation,

creditors withdrew their objections to the sale to MRGB and participated in drafting the Order which the Court signed on May 31, 1988. More importantly, the Court ultimately relied on these representations by Defendant Morris Rand's attorney in confirming the sale to MRGB instead of insisting that Rand fulfill his obligation pursuant to the April 19, 1988 agreement. Absent these representation, the sale to MRGB would not have been confirmed. Absent Rand's representations, Rand personally would have been required to comply with his commitment of April 19, 1988.

To argue, as Rand does, that he is not liable as the result of MRGB's refusal to consummate the sale because MRGB, and not he, is the

purchaser is inconsistent with his earlier position. This attempt at sophistry is an affront to the integrity of the judicial process. Consequently, he is judicially estopped from maintaining this position in the present adversary proceeding.

C) Damages

The Trustee is entitled to recover as damages the sale price as set forth in the Order of May 31, 1988 ($1,250,000.00) less the net realized from the three (3) sales conducted, which sum totaled $94,660.30.

The total amount of damages is $1,155,339.70 and is arrived at as follows:

Sale price per 05/31/88 Order of Court		$1,250,000.00
Three Judicial Sales	$21,961.57	
	9,398.73	
	63,300.00	
	$94,660.30	
Recoverable Damages		$1,155,339.70

An appropriate Order will be entered.

/s/
BERNARD MARKOVITZ
U.S. Bankruptcy Judge

Dated this 16th day of May, 1990.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

IN RE:	:	BANKRUPTCY
	:	NO. 87-3345
PIZAZZ DISCO & SUPPERCLUB, INC.,	:	
	:	
Debtor	:	
	:	
JAMES A. PROSTKO, TRUSTEE	:	
	:	
Plaintiff	:	
	:	
v.	:	Adversary
	:	No. 88-0545
MORRIS M. RAND, MRGB, INC. ROBERT WUNKER, ESQUIRE, and BLACKWELL, WALKER, FASCELL AND HOEHL,	:	
	:	
Defendants	:	

ORDER OF COURT

AND NOW at Pittsburgh in said District this 16th day of May, 1990, in accordance with the accompanying Memorandum Opinion, it is ORDERED, ADJUDGED and DECREED that judgment is

entered in favor of Plaintiff James A. Prostko, Trustee, and against Defendant Morris M. Rand and MRGB, Inc. in the amount of $1,155,339.70.

IT IS FURTHER ORDERED that Defendants Robert Wunker, Esquire and Blackwell, Walker, Fascell & Hoehl distribute the sum of $100,000.00 plus accrued interest, which sum presently is being held in a market investment account, to Plaintiff James A. Prostko, Trustee.

/s/
BERNARD MARKOVITZ
U.S. Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3477

JAMES A. PROSTKO, TRUSTEE

v.

MORRIS M. RAND; MRGB, INC.; ROBERT WUNKER, ESQUIRE; and BLACKWELL, WALKER FASCELL AND HOEHL

Morris M. Rand and MRGB, Inc.,

Appellants

SUR PETITION FOR PANEL REHEARING

BEFORE: STAPLETON, SCIRICA, and ALITO, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who

concurred in the decision having asked for rehearing, the petition for rehearing is denied.

BY THE COURT:

Walter K. Stapleton /s/
Circuit Judge

Dated: April 8, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

IN RE: PIZAZZ DISCO & SUPPERCLUB, INC.,	)	
MORRIS M. RAND; MRGB, INC., ROBERT WUNKER, ESQUIRE; and BLACKWELL, WALKER, FASCELL AND HOEL,	)	Civil Action No. 90-1163
	)	(Bankruptcy No. 87-3345)
Appellants,	)	
vs.	)	
JAMES A. PROSTKO, TRUSTEE,	)	
Appellee.	)	

ORDER OF COURT

AND NOW, this 2nd day of July, 1991,

IT IS ORDERED that the motion for rehearing by appellant Morris M. Rand be and hereby is denied.

/s/
Donald E. Ziegler
United States District Judge

cc: Counsel of record

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

In Re:

PIZAZZ DISCO &
SUPPERCLUB, INC., Case No. 87-03345

Debtor-in-
Possession Motion No. 88-2614M

ORDER CONFIRMING SALE OF PERSONAL PROPERTY FREE AND CLEAR OF CLAIMS, LIENS, AND ENCUMBRANCES

This 31st day of May, 1988, on consideration of the Motion of Attorney for Debtor-in-Possession to Sell Personal Property Free and Clear of Claims, Liens, and Encumbrances to MRGB, Inc., a Florida Corporation, for $1,250,000.00, or to a higher or better offeror, after hearing held May 31, 1988 at 11:30 a.m. on said Motion, the Court finds:

1. That service of the Notice of Hearing and Order setting Hearing on said Motion for this Sale was effected on Stanley R. Gumberg, Trustee, by J.J. Gumberg Co. Agent ("Landlord"); on Banc One Leasing; on the Unsecured Creditors; the Committee of Unsecured Creditors; on the Attorney for the Committee of Unsecured Creditors; and on the Attorney for the largest Unsecured Creditor, (other than Landlord) Plantation/Sysco, Inc.

2. That sufficient notice of said sale hearing and sale, together with the confirmation hearing hereon, was given to all creditors and parties in interest by the moving parties. Moreover, the sale was advertised and proof of such advertisement has been

filed in accordance with the Bankruptcy Code and Bankruptcy Rules.

A. $25,000.00 as a credit to the buyer in the matter of the liquor license.

B. $108,090.41 is a credit to the buyer, being that portion of the indebtedness to Banc One Leasing which is in excess of $250,000.00 debt on the Banc One leases hereinafter described in paragraphs 14, 15 and 16.

C. The buyer is <u>not</u> being granted a credit of $36,567.22 "as repayment of the May rent which was loaned to the Debtor-In-Possession," but the Debtor may present an Administrative Claim for such a loan.

D. $17,064.70 is a credit to the buyer as the proration, computed to June 14, 1988, of the June rent which the buyer will by paying.

9A. After performance under paragraph 12 of this Order, the buyer's attorney, Robert Wunker, will utilize funds from the cash portion of the purchase price, as necessary, to transfer to cash bond or otherwise discharge of record, all mechanics liens (which were caused by or on account of this Debtor) upon the Subject Premises, including, but not limited to, the nine (9) liens which were reported on the Commonwealth Land Title Insurance Policy Number 411-34365, with the understanding that to "bond off" each lien requires a payment into the registry of or to the Clerk of the Circuit Court of Broward County,

Florida, of the principal sum of that lien, plus 36% interest, plus $500.00; and then $16.00 in filing costs. Mr. Wunker has volunteered his services in this aspect, without compensation from the Debtor or from the Bankrupt Estate, and Mr. Wunker recognizes that the Debtor alleges that certain of these liens have been previously paid and/or released on the records and that certain other liens may be invalid because a Complaint was not filed within the one year statutory period. This bonding off or discharge of mechanic's lien shall occur on or before June 15, 1988, and before the remaining balance of the sales proceeds are disbursed. Additionally, Mr. Wunker will provide proof of the discharge of record to the Landlord, and will file such, along with a

REPORT OF DISBURSEMENTS, with the Clerk of this Court, no later than June 30, 1988.

9B. The parties have calculated that performance under paragraph 9A above may require $185,115.00; but Mr. Wunker has permission and authority to apply up to $240,000.00 to accomplish this purpose. Mr. Wunker is expected to exercise his good judgment and his duty to perform this undertaking is limited to the exercise of that good judgement.

9C. Any funds not used by Mr. Wunker for this purpose will be immediately delivered by Mr. Wunker to Joseph J. Bernstein, Esquire and will be considered as a SEPARATE RESERVE FUND FOR UNRESOLVED MECHANIC LIENS, and

Mr. Bernstein will hold that in escrow for 90 days (or September 19, 1988, whichever shall later occur) in a separate interest-bearing account which shall be used to bond off or otherwise discharge of record any other liens against the Subject Premises, which liens are based upon work contracted by Pizazz-Chauncys, until after the later of 90 days or September 19, 1988. Any funds then remaining in this SEPARATE RESERVE FUND FOR UNRESOLVED MECHANIC LIENS will be available to be mixed with the residue of the cash portion of the purchase price. If Mr. Bernstein disburses any funds from this SEPARATE RESERVE FUND FOR UNRESOLVED MECHANIC LIENS, for any purpose, including a transfer to the Fund created under paragraph 13 hereof, Mr. Bernstein will

file an appropriate Notice and Report of Disbursements with the Clerk of this Court.

10. After performance under paragraph 12 of this Order, the buyer or his agent or his closing officer, on June 15, 1988, will deliver, from the proceeds of the purchase price, the following funds to the Landlord, in the form of a cashier's check or wire transfer:

A. The sum of $234,262.77 being the amount recited in the (FINAL) STIPULATION AND SETTLEMENT AGREEMENT AND ORDER OF COURT ("Stipulation and Order") on March 14, 1988; and

B. The sum of $4,332.65 which LANDLORD advises is the pro rata share of the Debtor-in-Possession,

computed to June 15, 1988, of the liability insurance, which Landlord alleges was not part of the arrearages recited in the March 14, 1988 STIPULATION AND ORDER.

11. The buyer shall also deliver, out of the proceeds of the purchase price, on June 15, 1988, the sum of $331,250.00 to Joseph J. Bernstein, and Daniel S. Cohen of the Law Firm of Kirkpatrick and Lockhart, as Escrow Agents, the terms and conditions of such escrow undertaking to be recited in a separate AGREEMENT TO CREATE AN ESCROW ACCOUNT and ORDER OF COUNT.

12. Ronald Conway, Attorney for the Debtor-in-Possession, shall deliver to Mr. Robert L. Wunker, no

later than 10:30 a.m. on June 15, 1988, a Certificate issued by the Clerk of this United States Bankruptcy Court and by the Clerk of the United States District Court for the Western District of Pennsylvania, said Certificate being dated June 15, 1988 and stating that no Appeal has been filed and docketed with either Clerk as appealing from this Order.

13. All of the residue of the $1,000,000.00, if any, shall be delivered by the buyer to Joseph J. Bernstein, Esquire, Attorney for the Committee of Unsecured Creditors, who will serve as the Disbursing Agent until and unless replaced in a Confirmed Plan of Reorganization, or by further Order of Court. Mr. Bernstein will file a complete Report with the Clerk,

by June 30, 1988, showing the opening of the bank account, the place of the bank account, the number of the bank account, the name of the bank account and the authorized signature to the bank account.

14. The Buyer, MRGB, Inc. shall assume the two leases existing between the Debtor and Banc One Leasing corporation (Banc One) being identified as lease numbers 6392-1 and 7539-1 and dated November 19, 1985, December 22, 1986 (leases) respectively upon the following terms:

A. To cure the lease arrearages, at closing, to be held prior to June 15, 1988, Banc One shall be paid, by the Buyer, the sum of $36,827.03; if closing takes place

subsequent to June 15, 1988, but prior to July 15, 1988 Banc One shall receive $46,128.50. The sums paid to Banc One under this paragraph shall not be from the sale proceeds except through the credits (....) the $250,000.00 recited in paragraph 7C and the $108,090.41 recited in paragraph 8B.)

B. The balance of the leases, less amount paid at closing (lease balance) shall be paid by the Buyer to Banc One, plus any future charges, in accordance with the terms of the leases. The sums paid to Banc One under this paragraph shall not be from the sale proceeds except through the credits, (....) the $250,000.00 recited in paragraph 7C and the $108,090.41 recited in paragraph 8B).

C. The Buyer shall execute, prior to or at closing, such documents that Banc One deems necessary in order to effectuate the assumption of the leases, including without limitation new financing statements; except that no guarantee shall be required by the principals of MRGB, Inc.

D. Buyer's assumption of the leases does not in any way release, modify, alter or any other manner affect the obligations of current guarantors or lessees (other than this Debtor) of the Banc One leases.

E. The Court will determine whether Banc One is entitled, under the leases, to reimbursement of its legal fees and costs incurred in this transaction as an additional amount

necessary to cure the arrearages under the leases so that the leases can be assigned by the Debtor and assumed by MRGB, Inc. To the extent that the Court finds that Banc One's legal fees and costs are expenses that must be paid prior to an assignment of the leases so that MRGB, Inc. can assume the leases, then those fees and costs, upon proper Order of Court, shall be paid by Joseph J. Bernstein, or any other Disbursing Agent, from any funds of the Bankrupt Estate, to the extent that such funds are available.

If Banc One's legal fees and costs are found by the Court not to be necessary expenses that must be paid prior to MRGB, Inc.'s assumption of the leases, but are, instead, administrative claims as defined under Bankruptcy

Code, then these administrative claims shall be asserted by Banc One and considered by the Court in accordance with paragraph 18 of this Order.

15. Subject to the payments to be made and Mechanic's Liens to be discharged as hereinabove set forth to Banc One Leasing Corporation and Landlord; and MRGB, Inc.'s timely payment of the rent due June 1, 1988 to Landlord, under the terms of the lease, as that lease is defined in paragraph 1 of the Stipulation and Order; counsel of record for Banc One Leasing Corporation and for Landlord have stipulated that their respective leases are not known to be in arrears or otherwise in default upon the date of consummation of the closing, and upon presentation of an insurance certificate pursuant to

the terms of the lease with Landlord, and said Stipulation is hereby confirmed by the Court.

16. In furtherance of the intent and implementation of this Order, it is also ordered and decreed that the lease to Landlord, as that lease is defined in paragraph 1 of the Stipulation and Order, for the Subject Premises is hereby assumed by the Debtor and assigned to MRGB, Inc., a Florida corporation, the buyer herein. It is further ordered and decreed that the equipment leases between the Debtor and Banc One Leasing Corporation, being identified as lease numbers 6392-1 and 7539-1 and dated November 19, 1985 and December 22, 1986 respectively referred to in this Order, are hereby assumed by the Debtor and assigned to MRGB, Inc.,

a Florida corporation. The Buyer shall execute, prior to or at closing, such documents that are necessary to effectuate the assumption of the leases with the Landlord and with Banc One Leasing.

17. If an appeal from this Order is filed, then, on short notice, the Court shall forthwith hold a hearing to set a supersedeas bond required of the Appellant(s) to stay the sale; and the closing of the purchase by MRGB, Inc. shall be deferred pending the Order of Court to be rendered at that hearing.

18. Nothing in this Order shall be interpreted to prohibit or preclude any party or participant from submitting any APPLICATION FOR

COMPENSATION or APPLICATION FOR REIMBURSEMENT in this Bankruptcy Case.

BY THE COURT:

Judith K. Fitzgerald /s/